

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0535
Sales and Use Tax
For Tax Years 2002-2004**

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ISSUE

I. Sales and Use Tax—Imposition

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-7; IC § 6-2.5-5-8; IC § 6-8.1-5-1; IC § 6-8.1-5-4

Taxpayer protests the assessment of sales and use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana business in the golfing industry. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for sales tax for the years 2002 through 2004. Taxpayer protests a portion of these assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition

DISCUSSION

Taxpayer protests the imposition of sales and use tax on certain sales and purchases during the tax years 2002 through 2004. The Department based its assessments on the best information available, as provided by IC § 6-8.1-5-1(a). The burden of proving a proposed assessment wrong rests with the Taxpayer, as provided by IC § 6-8.1-5-1(b).

The sales tax is imposed under IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the

tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2, which states:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

(b) The use tax is also imposed on the storage, use, or consumption of a vehicle, an aircraft, or a watercraft, if the vehicle, aircraft, or watercraft:

(1) is acquired in a transaction that is an isolated or occasional sale; and

(2) is required to be titled, licensed, or registered by this state for use in Indiana.

(c) The use tax is imposed on the addition of tangible personal property to a structure or facility, if, after its addition, the property becomes part of the real estate on which the structure or facility is located. However, the use tax does not apply to additions of tangible personal property described in this subsection, if:

(1) the state gross retail or use tax has been previously imposed on the sale or use of that property; or

(2) the ultimate purchaser or recipient of that property would have been exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

(d) The use tax is imposed on a person who:

(1) manufactures, fabricates, or assembles tangible personal property from materials either within or outside Indiana; and

(2) uses, stores, distributes, or consumes tangible personal property in Indiana.

(e) Notwithstanding any other provision of this section, the use tax is not imposed on the keeping, retaining, or exercising of any right or power over tangible personal property, if:

(1) the property is delivered into Indiana by or for the purchaser of the property;

(2) the property is delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property; and

(3) the property is subsequently transported out of state for use solely outside Indiana.

Therefore, under IC § 6-2.5-2-1, when Taxpayer is acting as a retail merchant, Taxpayer must collect sales tax on the sale of tangible personal property as agent for Indiana. Under IC § 6-2.5-3-2, Taxpayer must pay use tax on purchases of property it consumes, when Indiana sales tax has not been paid.

Taxpayer first protests that the Department assessed sales tax on sales from Taxpayer to its customers. Taxpayer states that the sales in question were to exempt customers and so no sales tax was due on those sales. Of relevance is IC § 6-2.5-3-7, which states:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

In this case, Taxpayer provided copies of exemption certificates for some of its customers, and copies of cash register ledgers which list sales to those customers. Taxpayer believes that the provision of exemption certificates is sufficient to establish that sales to these customers are exempt from sales tax and the Department should therefore remove those amounts from the totals upon which the assessments were based.

Here, the question is not whether or not the customers in question are exempt. The question is whether or not the Department assessed sales tax on exempt sales. The Department notes that the cash register ledgers do not list what the exempt customers paid for. There is no way to know if the customer purchased tangible personal property, which would ordinarily be subject to sales tax, or if the customer paid for services such as greens fees, which would not be subject to sales tax, regardless of a customer's exempt status. The Department did not assess sales tax on services, and without further documentation the Department can not determine if it has already not taxed the amounts listed on the cash register ledgers. IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

In this case, Taxpayer's records were not detailed enough to allow the Department to determine the type of sales attributable to the customers who provided exemption certificates. As previously explained, the burden of proving a proposed assessment wrong rests with the Taxpayer, under IC 6-8.1-5-1(b). The available documentation does not meet this burden.

Taxpayer's second point of protest is that the Department assessed use tax on some of Taxpayer's purchases of tangible personal property. As part of this protest, Taxpayer provided documentation showing that sales tax was paid on two purchases from a trucking and excavating company. Also, Taxpayer provided sufficient documentation to establish that one purchase of black rubberized golf tools was for resale. IC § 6-2.5-5-8(b) states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

Since Taxpayer purchased the black rubberized golf tools for resale, that purchase was exempt under IC § 6-2.5-5-8(b).

Taxpayer also protests that other purchases were for resale or had sales tax paid and therefore were not subject to use tax. Taxpayer did not provide documentation supporting its protest on these items. For these items, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(b).

In conclusion, Taxpayer did not provide sufficient documentation to support its protest that sales to some of its customers should be removed from the sales tax assessments. Taxpayer did provide sufficient documentation to support its protest that use tax is not due on two purchases from a trucking and excavating company and on one purchase for resale. Taxpayer did not provide sufficient documentation to support its protest of use tax on the remaining items.

FINDING

Taxpayer's protest is sustained in part and denied in part.

WL/BK/DK June 1, 2007